

Restitution

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In this chapter. . .

This chapter discusses a crime victim's constitutional and statutory rights to restitution. At sentencing in criminal cases or at disposition in juvenile delinquency cases, the defendant or juvenile may be ordered to pay restitution to compensate the victim for losses caused by the offense. This chapter details the general requirements for ordering and collecting restitution as well as special requirements for collecting restitution ordered as a condition of probation or parole. The subjects discussed in this chapter include the following:

- F the compensatory (rather than punitive) nature of restitution and its effect on the court's authority to order restitution;
- F persons or entities entitled to restitution;
- F the amount of restitution that a court may order;
- F the method of payment of restitution;
- F revocation of probation or parole upon failure to pay restitution;
- F allocation of the money received to pay fines, costs, restitution, fees, assessments, and other payments; and
- F coordination of restitution payments and crime victim compensation from the Crime Victim Services Commission.

Restitution is also discussed in other portions of this manual. See Section 5.8 (Access to Victim Impact Information Prior to Trial), Section 7.9 (Notification of Conviction or Adjudication and the Right to Participate in Sentencing or Disposition), and Section 9.2 (Using Victim Impact Statements at Sentencing or Disposition).

10.1 The Victim's Constitutional Right to Restitution

The Michigan Constitution preserves the right of crime victims to restitution from their offenders. Const 1963, art 1, § 24, states in relevant part:

“(1) Crime victims, as defined by law, shall have the following rights, as provided by law:

....

The right to restitution.”

A. Compensatory Nature of Restitution

Michigan courts have consistently stated that restitution is intended to compensate the victim rather than punish the defendant or juvenile. See, for example, *People v Grant*, 455 Mich 221, 230 n 10 (1997) (attempting to return the victim to his or her pre-offense state contrasts with the traditional purposes of criminal sentences—rehabilitation, deterrence, community protection, and punishment), *People v Law*, 459 Mich 419, 424 (1999) (the term “restitution” as used in the Crime Victim’s Rights Act (“CVRA”) has the same meaning as used in civil actions; therefore, interest on restitution may be properly ordered under the CVRA), and *People v Carroll*, 134 Mich App 445, 446 (1984) (the purpose of restitution is to compensate the injured party, not to force the defendant to disgorge the benefit gained from the offense).

Note: The United States Supreme Court has stated that for purposes of federal bankruptcy proceedings, there is no meaningful distinction between criminal fines and restitution. *Kelly v Robinson*, 479 US 36, 52–53; 107 S Ct 353; 93 L Ed 2d 216 (1986). See Section 10.20(B), below, for further discussion of the *Kelly* case and the effect of bankruptcy on a restitution order.

Because restitution is the victim’s constitutional right and is mandatory under MCL 780.766(2); MSA 28.1287(766)(2), MCL 780.794(2); MSA 28.1287(794)(2), and MCL 780.826(2); MSA 28.1287(826)(2), the prosecutor and defendant or juvenile cannot exclude restitution from a plea or sentence agreement. *People v Ronowski*, 222 Mich App 58, 61 (1997).

The Michigan Supreme Court has held that because the nature of restitution is compensatory, not punitive, a restitution order survives the defendant’s death and may be enforced against his or her estate. *People v Peters*, 449 Mich 515, 523–24 (1995).

B. Claims for Restitution That Arise After Sentencing or Disposition

All articles of the CVRA require the court to order restitution “when sentencing a defendant” or “at the dispositional hearing or sentencing” of a juvenile. MCL 780.766(2); MSA 28.1287(766)(2), MCL 780.794(2); MSA 28.1287(794)(2), and MCL 780.826(2); MSA 28.1287(826)(2). However, the CVRA does not provide a time limit within which restitution claims must be made. Compare 18 USC 3664(d)(5) of the federal Victim and Witness Protection Act (“If the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing”).

If the victim claims restitution after the court has entered a judgment of sentence, order of commitment, or order of probation, the court may not have the authority to amend its judgment or order to add a restitution provision.

- F In criminal cases, the sentencing court may not modify a valid sentence after it has been imposed except as allowed by law. MCR 6.429(A). The failure to afford a crime victim his or her rights at sentencing does not justify resentencing a defendant. *People v Pfeiffer*, 207 Mich App 151, 155 (1994), and *People v Smith*, 180 Mich App 622, 623–24 (1989).
- F If a juvenile is committed to the Family Independence Agency following juvenile delinquency or “automatic waiver” proceedings, the court maintains jurisdiction over the juvenile. MCL 769.1(10); MSA 28.1072(10), and MCL 712A.18c(2); MSA 27.3178(598.18c)(2). However, no explicit statutory authority exists to amend the court’s order of commitment to include restitution. See MCL 712A.18c(3); MSA 27.3178(598.18c)(3), and MCL 769.1(11); MSA 28.1072(11) (court may order changes in juvenile’s placement or treatment plan based on an annual progress review).
- F If an adult or juvenile has been placed on probation, the court has authority to alter or amend conditions of probation while the court has jurisdiction over the adult or juvenile. MCL 771.2(2); MSA 28.1132(2) (provision applicable to adult probation), MCL 712A.18i(2); MSA 27.3178(598.18i)(2) (court has authority to alter or amend probation conditions when imposition of adult sentence has been delayed in a designated case), and MCL 712A.19(1); MSA 27.3178(598.19)(1) (provision applicable to juvenile delinquency cases).

The Michigan Court of Appeals has held that a sentencing court may *amend an existing order of restitution* after sentencing with regard to persons entitled to restitution and the amount of restitution owed. *People v Greenberg*, 176 Mich App 296, 311 (1989).

10.2 Statutory Authority for Ordering Restitution

Restitution is authorized under several statutory sections. Each article of the CVRA contains substantially similar restitution provisions. These provisions are:

- F MCL 780.766–780.767; MSA 28.1287(766)–28.1287(767) (restitution under the felony article of the CVRA);
- F MCL 780.794–780.795; MSA 28.1287(794)–28.1287(795) (restitution under the juvenile article of the CVRA); and

- F MCL 780.826; MSA 28.1287(826) (restitution under the misdemeanor article of the CVRA).

In addition, provisions of the Code of Criminal Procedure, the Juvenile Code, and the Department of Corrections code deal with restitution. These provisions are:

- F MCL 769.1a; MSA 28.1073 (restitution under the Code of Criminal Procedure);
- F MCL 771.3(1)(e); MSA 28.1133(1)(e) (restitution as a condition of probation ordered for criminal defendants);
- F MCL 712A.30–712A.31; MSA 27.3178(598.30)–27.3178(598.31) (restitution in juvenile delinquency cases under the Juvenile Code); and
- F MCL 791.236(5); MSA 28.2306(5) (restitution as a condition of parole).

Prior to a recent amendment to the CVRA, the foregoing provisions contained in the Code of Criminal Procedure, the Juvenile Code, and the Department of Corrections code were substantially similar to the restitution provisions of the CVRA. The recent amendment to the CVRA added several rights and procedures to the restitution provisions of the CVRA. See 2000 PA 503, effective June 1, 2001. However, the restitution provisions contained in the other statutes listed above were not contemporaneously amended. To avoid confusion, the amended restitution provisions of the CVRA are discussed throughout this chapter, and the provisions contained in other law are discussed only when they contain additional rights or procedures not contained in the amended CVRA provisions.

Applying an amended statute to an offender's conduct that occurred before the effective date of the amendment may violate the Ex Post Facto Clause of the state constitution if such "retroactive application" increases the offender's punishment. In *People v Slocum*, 213 Mich App 239, 242–44 (1995), the Court of Appeals held that retroactive application of an amendment to the CVRA allowing courts to order restitution to governmental entities violated the Ex Post Facto Clause of Const 1963, art 1, § 10. The Court found that retroactive application of the amendment would increase a defendant's punishment by increasing the amount of restitution for which he or she would be liable. The *Slocum* Court relied on *People v Peters (After Remand)*, 205 Mich App 312, 319 (1994), for the proposition that restitution punishes the defendant rather than compensating the victim. However, the Michigan Supreme Court reversed the Court of Appeals in *People v Peters*, 449 Mich 515 (1995).^{*} In doing so, the Michigan Supreme Court expressly stated that restitution under the CVRA is compensatory rather than punitive and held that a restitution order survives a defendant's death. *Id.* at 523–24. Since the Supreme Court's decision in *Peters*, no Michigan appellate court has revisited the issue of retroactivity decided in *Slocum*, *supra*.

^{*}The *Slocum* Court acknowledged that the *Peters* decision had been overruled by the Michigan Supreme Court but concluded that it had been overruled on grounds other than the punitive or compensatory nature of restitution.

Because the constitutional prohibition against ex post facto laws extends only to substantive laws that increase the penalty for an offense, provisions of 2000 PA 503 that deal with purely procedural matters or that do not increase the amount of restitution that a defendant, juvenile, or juvenile's parent must pay may be applied to offenses that occurred prior to June 1, 2001, the effective date of the amendments.

10.3 Offenses for Which Restitution Must Be Ordered

The CVRA requires restitution for any criminal offense. The CVRA's restitution provisions are as follows:

- F For cases under the felony article of the CVRA, MCL 780.766(2); MSA 28.1287(766)(2), requires a court to order restitution when sentencing a defendant convicted of a "crime." "Crime" is defined in MCL 780.752(1)(b); MSA 28.1287(752)(1)(b), as offenses for which the offender, upon conviction, may be sentenced to imprisonment for more than one year, or offenses which are designated by law as felonies.
- F For cases under the juvenile article of the CVRA, MCL 780.794(2); MSA 28.1287(794)(2), requires a court to order restitution at the disposition or sentencing hearing for an "offense." MCL 780.794(1)(a); MSA 28.1287(794)(1)(a), defines "offense" as "a violation of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine."
- F For cases under the misdemeanor article of the CVRA, MCL 780.826(2); MSA 28.1287(826)(2), requires a court to order restitution when sentencing a defendant for a "misdemeanor." MCL 780.826(1)(a); MSA 28.1287(826)(1)(a), defines "misdemeanor" as "a violation of a law of this state or a local ordinance that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, but that is not a felony."

Note that the above provisions require restitution for *all* misdemeanors, not just "serious" or "specified" misdemeanors.

*See Sections 7.9(B) and (C) for discussion of these provisions.

The juvenile and misdemeanor articles of the CVRA require the person preparing a disposition report or the prosecuting attorney to notify victims of their right to submit information to the court regarding restitution in cases involving "serious" or "specified" misdemeanors. MCL 780.791(3)(c); MSA 28.1287(791)(3)(c), and MCL 780.823(3)(c); MSA 28.1287(823)(3)(c).^{*} These notice requirements do not apply to other misdemeanors (e.g., malicious destruction of property of less than \$1000.00, MCL 750.380(4)–(5); MSA 28.612(4)–(5)). Nonetheless, all crime victims have constitutional and statutory rights to restitution whether or not they receive notice of their

right to submit information regarding the amount of their losses prior to disposition or sentencing.

10.4 Required Restitution When Ordering an Informal Disposition in a Juvenile Delinquency Case

Under MCL 780.786b(1); MSA 28.1287(786b)(1), the court in a juvenile delinquency case must notify the prosecuting attorney of the court's intent to divert the case, place the case on the consent calendar, or use any other disposition that removes the case from the adjudicative process.* The prosecuting attorney, in turn, must notify the victim, who must be given the opportunity to address the court on the court's proposed action. If the court enters an order removing the case from the adjudicative process, "the court shall order the juvenile or the juvenile's parents to provide full restitution as provided in [MCL 780.794; MSA 28.1287(794)]." MCL 780.786b(1); MSA 28.1287(786b)(1). See also MCL 780.794(2); MSA 28.1287(794)(2) (the court must order restitution under MCL 780.794; MSA 28.1287(794), even though no dispositional hearing is held).

*The provisions discussed in this section are effective June 1, 2001. See Section 6.4(B) for a detailed discussion of MCL 780.786b(1); MSA 28.1287(786b)(1).

10.5 Persons or Entities Entitled to Restitution

In all cases, the court must order restitution to victims of the course of conduct that led to the defendant's or juvenile's conviction or adjudication, to individuals or entities (including insurance companies) that have compensated the victim for losses incurred due to that course of conduct, and to individuals or entities that have provided services to the victims of that course of conduct. The court must order restitution to be paid to the victim or the victim's estate first. However, if an individual or entity has compensated or will compensate the victim for losses resulting from the defendant's or juvenile's course of conduct, the court shall not order restitution to the victim and shall state on the record why it is not doing so. MCL 780.766(8); MSA 28.1287(766)(8), states in relevant part:

"[A]n order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its actions."

MCL 780.794(8); MSA 28.1287(794)(8), and MCL 780.826(8); MSA 28.1287(826)(8), contain substantially similar provisions.

A. Any Victim of the Course of Conduct That Gave Rise to the Conviction or Adjudication

In all cases, the court must order restitution to any victim of the course of conduct that gave rise to the defendant's or juvenile's conviction or adjudication. MCL 780.766(2); MSA 28.1287(766)(2), MCL 780.794(2); MSA 28.1287(794)(2), and MCL 780.826(2); MSA 28.1287(826)(2).

For purposes of restitution, "victim" is defined as an individual who suffers direct or threatened physical, financial, or emotional harm as a result of an offense, or a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of an offense. MCL 780.766(1); MSA 28.1287(766)(1), MCL 780.794(1)(b); MSA 28.1287(794)(1)(b), and MCL 780.826(1)(b); MSA 28.1287(826)(1)(b).

If the victim is deceased, the court shall order restitution to the victim's estate. MCL 780.766(7); MSA 28.1287(766)(7), MCL 780.794(7); MSA 28.1287(794)(7), and MCL 780.826(7); MSA 28.1287(826)(7).

1. The offender may be ordered to pay restitution to victims of offenses for which the offender was not convicted or adjudicated.

In *People v Gahan*, 456 Mich 264 (1997), the trial court ordered defendant to pay a total of \$25,000.00 in restitution. Defendant was ordered to compensate more than 10 different victims whom he had defrauded in a similar fashion, even though he was only convicted of two counts of embezzlement. The Supreme Court unanimously affirmed, holding that the phrase "any victim of the defendant's course of conduct" should be given the broad meaning that was intended by the Legislature. The Court concluded that "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *Id.* at 272. See also *People v Persails*, 192 Mich App 380, 383 (1991) (the defendant was properly ordered to pay restitution for uncharged offenses where a plea bargain was likely motivated by dismissal of those offenses), and compare *People v Winquest*, 115 Mich App 215, 221–22 (1982) (requiring the defendant to pay restitution related to an offense for which he was tried but acquitted was improper).

In *People v Letts*, 207 Mich App 479, 481 (1994), the defendant, who pled guilty to breaking and entering an occupied dwelling, was properly ordered to pay restitution for damage caused by a fire that was set by one of his accomplices after the defendant had left the dwelling. The defendant was neither charged with nor convicted of arson.

*See Section 10.11, below.

Note: The Advisory Committee for this manual recommends that the prosecuting attorney and defendant or juvenile agree on the amount of restitution before finalizing a plea agreement. This will help to avoid a request for a hearing* or a motion to withdraw the

plea if the court orders restitution in an amount greater than expected by the defendant or juvenile. It will also allow the prosecuting attorney to inform victims in a timely manner of the amount of restitution that will be ordered.

Expenses that are not reimbursable under the relevant statutes may not be included in a restitution order. See, e.g., *People v Jones*, 168 Mich App 191, 196 (1988) (the trial court erred in ordering restitution of the victim's traveling expenses).

2. The court may order restitution to a governmental agency for the loss of “buy money” resulting from drug offenses.

“Narcotics Enforcement Teams” (NETs) may obtain restitution of “buy money” used to purchase controlled substances. *People v Crigler*, 244 Mich App 420, 427–28 (January 26, 2001). In *Crigler*, the Court of Appeals first noted that the Crime Victim's Rights Act was amended in 1993 to provide that governmental entities could be victims under the act. The Court then concluded that loss of the “buy money” constituted “financial harm” resulting from an offense because loss of the money limited the NET's ability to conduct future investigations.

B. Individuals or Entities That Have Compensated the Victim

In addition to direct victims of the defendant's or juvenile's course of conduct, the court must order restitution to individuals or organizations that have compensated the direct victim for losses incurred as a result of that course of conduct. The relevant portion of MCL 780.766(8); MSA 28.1287(766)(8), states as follows:

“The court shall order restitution to the crime victim services commission* or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss.”

MCL 780.794(8); MSA 28.1287(794)(8), and MCL 780.826(8); MSA 28.1287(826)(8), contain substantially similar provisions. This provision allows the court to order restitution to insurance companies to the extent that they have compensated the victim for his or her loss. See *People v Washpun*, 175 Mich App 420, 423 (1989) (prior to the statutory amendment that added the section quoted above, the Legislature intended insurance companies to receive restitution under the CVRA to the extent that they compensated victims for losses arising from crimes).

*For information regarding the coordination of payment of restitution and crime victim compensation, see Sections 10.21 and Section 10.24.

C. Individuals or Entities That Have Provided Services to the Victim

The court must also order restitution to individuals or organizations that have provided services to the victim as a result of the defendant's or juvenile's course of conduct. This includes victim services organizations. The relevant portion of MCL 780.766(8); MSA 28.1287(766)(8), states as follows:

“The court shall . . . order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation.”

MCL 780.794(8); MSA 28.1287(794)(8), and MCL 780.826(8); MSA 28.1287(826)(8), contain substantially similar provisions.

10.6 Time Requirements for Making Restitution

Unless otherwise provided by the court, restitution shall be made immediately. The court may require the defendant or juvenile to make restitution within a specified period or in specified installments. MCL 780.766(10); MSA 28.1287(766)(10), MCL 780.794(10); MSA 28.1287(794)(10), and MCL 780.826(10); MSA 28.1287(826)(10).

10.7 Amount of Restitution Required

*The types of losses that are compensable are discussed in Sections 10.8 and 10.9, below.

“In determining the amount of restitution to order. . . , the court shall consider the amount of the loss sustained by any victim as a result of the offense.” MCL 780.767(1); MSA 28.1287(767)(1), and MCL 780.795(1); MSA 28.1287(795)(1).*

When determining the amount of restitution to order, the court must not consider the defendant's or juvenile's ability to pay the restitution. See 1996 PA 562 (eliminating the possibility that the court order partial restitution because of the offender's inability to pay full restitution). MCL 780.766(2); MSA 28.1287(766)(2), states that “when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make *full restitution* to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.” (Emphasis added.) MCL 780.794(2); MSA 28.1287(794)(2), and MCL 780.826(2); MSA 28.1287(826)(2), contain similar requirements for imposing a disposition upon or sentencing a juvenile or misdemeanor.

Codefendants and coconspirators may be held jointly and severally liable for the entire amount of loss. *People v Peterson*, 62 Mich App 258, 267–68 (1975). In *People v Grant*, 455 Mich 221 (1997), defendant pleaded guilty to conspiracy to utter and publish and was ordered to pay \$175,000.00 in restitution. Defendant appealed, arguing that he played a limited role in the conspiracy and should not be liable for the entire \$175,000.00. The Michigan Supreme Court disagreed, reasoning that because each conspirator is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy, ordering the defendant to pay full restitution was justified. *Id.* at 236.

In an appropriate case, the amount of the victim’s loss may include prejudgment interest. In *People v Law*, 459 Mich 419, 424 (1999), the Michigan Supreme Court held that where the defendant pled guilty to criminal desertion and abandonment, the trial court properly ordered interest on unpaid child support and medical bills under the CVRA. The Court also stated that the appropriate interest rate may be determined by reference to a “closely related statute” (the Support and Visitation Enforcement Act in this case); however, where there is no “closely related statute,” the court has discretion to set a reasonable rate of interest. *Id.* at 429 n 12.

Pending civil litigation between the victim and offender is an insufficient reason for ordering less than full restitution. The amount of restitution paid to the victim must be set off against any amount the victim recovers as compensatory damages in a civil suit against the defendant or juvenile. *People v Avignone*, 198 Mich App 419, 423 (1993).*

*See Section 10.21, below (required set off of amounts later recovered by victim).

10.8 Calculating Restitution Where the Offense Results in Property Damage, Destruction, Loss, or Seizure

If criminal conduct results in damage to or loss or destruction of a victim’s property, or if it results in the seizure or impoundment of a victim’s property,* the court may order that the defendant or juvenile pay restitution to the victim. The relevant statutory provisions, MCL 780.766(3)(a)–(c); MSA 28.1287(766)(3)(a)–(c), MCL 780.794(3)(a)–(c); MSA 28.1287(794)(3)(a)–(c), and MCL 780.826(3)(a)–(c); MSA 28.1287(826)(3)(a)–(c), determine the amount of restitution to be ordered in such cases. These provisions state that the court may order the defendant or juvenile to do one or more of the following:

“(a) Return the property to the owner of the property or to a person designated by the owner.

“(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:

*See Section 6.8 for a discussion of returning a victim’s property to him or her following investigation or trial.

(i) The value of the property on the date of the damage, loss, or destruction.

(ii) The value of the property on the date of sentencing [or disposition].

“(c) Pay the costs of the seizure or impoundment, or both.”

Thus, the court may order the defendant or juvenile to return the property to the victim or the victim’s designee. If return of the property is impossible, impractical, or inadequate, the court may order the defendant or juvenile to pay the value of the property on the day it was damaged, lost, or destroyed (if the value of the property has depreciated or remained the same) or the value of the property at sentencing or disposition (if the property has appreciated in value), less the value of any property returned to the victim. In addition, the court may order the defendant to pay the costs of seizure, impoundment, or both.

In *People v Guajardo*, 213 Mich App 198, 199–200 (1995), the defendant was ordered to pay \$28,105.00 in restitution for jewelry that he stole from a retail jewelry store. This amount, which was uncontroverted by any credible evidence, represented the retail value of the stolen jewelry. The Court of Appeals upheld the restitution order, finding that the victim lost the replacement value of the jewelry plus expected profit from its sale, and the victim’s profit would have been used to pay operating expenses and employee wages.

10.9 Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

A. Expenses Related to Physical or Psychological Injury

If criminal conduct results in physical or psychological injury to a victim, the court may order the defendant or juvenile to pay restitution for professional services and devices, physical and occupational therapy, lost income, medical and psychological treatment for the victim’s family, and homemaking and child care expenses. MCL 780.766(4)(a)–(e); MSA 28.1287(766)(4)(a)–(e), state that the court may order the defendant to do one or more of the following, as applicable:

“(a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.

“(b) Pay an amount equal to the reasonably determined cost of physical and occupational therapy and

rehabilitation actually incurred and reasonably expected to be incurred.

“(c) Reimburse the victim or the victim’s estate for after-tax income loss suffered by the victim as a result of the crime.

“(d) Pay an amount equal to the reasonably determined cost of psychological and medical treatment for members of the victim’s family actually incurred and reasonably expected to be incurred as a result of the crime.

“(e) Pay an amount equal to the reasonably determined costs of homemaking and child care expenses actually incurred and reasonably expected to be incurred as a result of the crime or, if homemaking or child care is provided without compensation by a relative, friend, or any other person, an amount equal to the costs that would reasonably be incurred as a result of the crime for that homemaking and child care, based on the rates in the area for comparable services.”

MCL 780.794(4)(a)–(e); MSA 28.1287(794)(4)(a)–(e), and MCL 780.826(4)(a)–(e); MSA 28.1287(826)(4)(a)–(e), contain substantially similar provisions.

The amount of restitution for professional services and devices, physical and occupational therapy, medical and psychological treatment for the victim’s family, and homemaking and child care expenses must be reasonably determined and include both expenses actually incurred and reasonably expected to be incurred. Thus, “prospective” restitution may be ordered.*

MCL 780.766(4)(c); MSA 28.1287(766)(4)(c), MCL 780.794(4)(c); MSA 28.1287(794)(4)(c), and MCL 780.826(4)(c); MSA 28.1287(826)(4)(c), allow the court to order a defendant or juvenile to “[r]eimburse the victim or the victim’s estate for after-tax income loss suffered by the victim as a result of the crime.” The Court of Appeals has held that the court may not order restitution for lost income of a homicide victim’s family member under this provision. *People v Paquette*, 214 Mich App 336, 346 (1995). The Court of Appeals in *Paquette* noted that MCL 780.766(4)(c); MSA 28.1287(766)(4)(c), does not explicitly include the direct victim’s family members, and that for purposes of restitution, “victim” includes only those individuals who have suffered direct or threatened harm. *Id.*

B. Expenses Related to the Victim’s Death

If criminal conduct results in the death of a victim, the court must order the restitution to be paid to the victim’s estate. MCL 780.766(7); MSA

*These provisions are effective June 1, 2001. See Section 10.1(B), above, for discussion of amending restitution orders.

28.1287(766)(7), MCL 780.794(7); MSA 28.1287(794)(7), and MCL 780.826(7); MSA 28.1287(826)(7).

The court may order restitution in “an amount equal to the cost of actual funeral and related services.” MCL 780.766(4)(f); MSA 28.1287(766)(4)(f), MCL 780.794(4)(f); MSA 28.1287(794)(4)(f), and MCL 780.826(4)(f); MSA 28.1287(826)(4)(f). Where the defendant failed to show that the \$11,864.22 in restitution ordered by the sentencing court for funeral and burial expenses included an \$11,000.00 reward paid by the victim’s family, the Court of Appeals found no error in the restitution order. *People v Ho*, 231 Mich App 178, 192 (1998).

*These provisions are effective June 1, 2001.

The court may also order the defendant or juvenile to reimburse a parent or guardian of a victim for a lost tax deduction or credit. MCL 780.766(4)(g); MSA 28.1287(766)(4)(g), MCL 780.794(4)(g); MSA 28.1287(794)(4)(g), and MCL 780.826(4)(g); MSA 28.1287(826)(4)(g),* state:

“If the deceased victim could be claimed as a dependent by his or her parent or guardian on the parent’s or guardian’s federal, state, or local income tax returns, pay an amount equal to the loss of the tax deduction or tax credit. The amount of reimbursement shall be estimated for each year the victim could reasonably be claimed as a dependent.”

C. Triple Restitution for Serious Bodily Impairment or Death of a Victim

*These provisions are effective June 1, 2001.

If criminal conduct causing bodily injury to the victim also results in the serious impairment of a body function or the death of that victim, the court may order up to three times the amount of restitution otherwise allowed under the CVRA. MCL 780.766(5); MSA 28.1287(766)(5), MCL 780.794(5); MSA 28.1287(794)(5), and MCL 780.826(5); MSA 28.1287(826)(5).* “Serious impairment of a body function” includes but is not limited to the following:

“(a) Loss of a limb or use of a limb.

“(b) Loss of a hand or foot or use of a hand or foot.

“(c) Loss of an eye or use of an eye or ear.

“(d) Loss or substantial impairment of a bodily function.

“(e) Serious visible disfigurement.

“(f) A comatose state that lasts for more than 3 days.

“(g) Measurable brain damage or mental impairment.

“(h) A skull fracture or other serious bone fracture.

“(i) Subdural hemorrhage or subdural hematoma.

“(j) Loss of a body organ.” MCL 780.766(5)(a)–(j); MSA 28.1287(766)(5)(a)–(j), MCL 780.794(5)(a)–(j); MSA 28.1287(794)(5)(a)–(j), and MCL 780.826(5)(a)–(j); MSA 28.1287(826)(5)(a)–(j).

Michigan’s “no-fault” automobile insurance act provides that an injured person may recover non-economic (“pain and suffering”) tort damages from a driver if the person suffers “serious impairment of a body function.” MCL 500.3135(7); MSA 24.13135(7), defines “serious impairment of a body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” The injury or condition must be medically identifiable and have a physical basis. SJI2d 36.11. The Court of Appeals has stated that trial courts should consider the following nonexhaustive list of factors when deciding whether an impairment is serious for purposes of the no-fault act: “extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery.” *Kern v Blethen-Coluni*, 240 Mich App 333, 341 (2000).

Mental or emotional injuries may qualify as impairments of body functions. SJI2d 36.02 states:

“The operation of the mind and of the nervous system are body functions. Mental or emotional injury which is caused by physical injury or mental or emotional injury not caused by physical injury but which results in physical symptoms may be a serious impairment of . . . body function.”

10.10 Required Reports by Probation Officers

Under the felony and juvenile articles of the CVRA, the court may order a probation officer to obtain information pertaining to the amount of loss suffered by a victim. If the court orders a probation officer to obtain such information, he or she must include this information in the presentence investigation report (“PSIR”), a disposition report, or in a separate report, as the court directs. MCL 780.767(1)–(2); MSA 28.1287(767)(1)–(2), and MCL 780.795(1)–(2); MSA 28.1287(795)(1)–(2). Although the misdemeanor article of the CVRA does not contain a section dealing with the matters discussed in this section, MCL 771.14(1); MSA 28.1144(1), gives the court authority to order a PSIR in misdemeanor cases.

In cases under the felony article of the CVRA, the court must disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the amount of loss. MCL 780.767(3); MSA 28.1287(767)(3). In cases under the juvenile article of the CVRA, the court

must disclose to the juvenile, the juvenile's supervisory parent, and the prosecuting attorney all portions of the disposition or other report pertaining to the amount of loss. MCL 780.795(3); MSA 28.1287(795)(3). See also MCL 771.14(3); MSA 28.1144(3) (information in a PSIR must be disclosed to the parties).

10.11 Hearing Requirements and Burden of Proof

*However, a hearing is required before ordering a juvenile's parent to pay restitution. See Section 10.12, below.

When ordering a defendant or juvenile to pay restitution, the court is not required to hold a hearing to determine the type or amount of restitution.* “Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence.” *People v Grant*, 455 Mich 221, 243 (1997). The trial judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges that information. *Id.* at 233–34. If an evidentiary hearing is held, the rules of evidence do not apply, other than those with respect to privileges. MRE 1101(b)(3).

*The misdemeanor article does not contain a section dealing with the matters discussed in this paragraph.

MCL 780.767(4); MSA 28.1287(767)(4), of the felony article of the CVRA and MCL 780.795(4); MSA 28.1287(795)(4), of the juvenile article of the CVRA state that “any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence.”* The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney. *Id.* The prosecuting attorney must show “with some precision” the amount of loss resulting from uncharged offenses related to the conviction offense, and the defendant is entitled to decline to testify at a hearing to determine the proper amount of restitution without having that silence used against him or her. *People v Alvarado*, 142 Mich App 151, 164–65 (1984), overruled on other grounds 428 Mich 356, 363 n 7 (1987). In cases involving juveniles, the burden of demonstrating the financial resources of the juvenile's supervisory parent and any other moral or legal financial obligation of the parent shall be on the supervisory parent. MCL 780.795(4); MSA 28.1287(795)(4).

The amount of loss for which restitution is ordered must be based on evidence. *People v Guajardo*, 213 Mich App 198, 200 (1995). The amount of loss may be shown by facts in a presentence report, in a victim impact statement, or adduced at sentencing. *People v Hart*, 211 Mich App 703, 706 (1995) (the amount of loss was adequately shown by the presentence report and victim impact statement), *People v Sickles*, 162 Mich App 344, 363–65 (1987) (the amount embezzled by the defendant was adequately shown by the presentence report and a consent judgment in a related civil suit), *People v Tyler*, 188 Mich App 83, 87 (1991) (where the presentence report was not included in the record on appeal, there was no means of determining whether the trial court arbitrarily ordered an amount of restitution to the victim of a sexual assault), and *People v White*, 212 Mich App 298, 316 (1995) (where the stalking victim's statement that her financial losses “equaled hundreds or thousands of

dollars” was unsubstantiated by other evidence, remand to the trial court for an evidentiary hearing was necessary).

Note: If a qualified “victim-offender reconciliation program” is available, and if victim participation in the program is completely voluntary, the amount of restitution may be established by the victim and offender rather than the court.

10.12 Hearings on Restitution Payable by Parents of Juvenile Offenders

In juvenile delinquency cases, “traditional” waiver cases, and designated cases,* the court may order the juvenile’s parent to pay some or all of the restitution owed to the victim. MCL 780.794(15); MSA 28.1287(794)(15), and MCL 780.766(15)(a); MSA 28.1287(766)(15)(a). The juvenile’s parent must be given an opportunity to be heard on the issue. The relevant statutory provisions state:

“If the court determines that a juvenile is or will be unable to pay all of the restitution ordered, after notice to the juvenile’s parent or parents and an opportunity for the parent or parents to be heard the court may order the parent or parents having supervisory responsibility for the juvenile at the time of the acts upon which an order of restitution is based to pay any portion of the restitution ordered that is outstanding. An order under this subsection does not relieve the juvenile of his or her obligation to pay restitution as ordered, but the amount owed by the juvenile shall be offset by any amount paid by his or her parent. As used in this subsection, ‘parent’ does not include a foster parent.” MCL 780.766(15); MSA 28.1287(766)(15), and MCL 780.794(15); MSA 28.1287(794)(15).

Note: If a victim of the juvenile’s offense is the juvenile’s parent, the court may choose not to order the parent to pay restitution under these provisions.

The court must “take into account the parent’s financial resources and the burden that the payment of restitution will impose, with due regard to any other moral or legal financial obligations that parent may have.” If a parent is required to pay restitution, the court must order payment to be made in specified installments *and* within a specified period of time. MCL 780.766(16); MSA 28.1287(766)(16), and MCL 780.794(16); MSA 28.1287(794)(16).

Note: When the juvenile is ordered to pay restitution in delinquency proceedings, the court may order payment in

*There is no authority to order a parent to pay restitution in “automatic waiver” cases. For discussion of the types of proceedings involving juveniles, see Section 3.2(H).

specified installments *or* within a specified period of time. MCL 780.794(10); MSA 28.1287(794)(10).

An order directed to a parent shall not be binding unless the parent has been given an opportunity for a hearing pursuant to the issuance of a summons or notice as provided in MCL 712A.12; MSA 27.3178(598.12), and MCL 712A.13; MSA 27.3178(598.13). MCL 712A.18(4); MSA 27.3178(598.18)(4). The order, bearing the seal of the court, must be served on the parent or other person as required by MCL 712A.13; MSA 27.3178(598.13). MCL 712A.18(4); MSA 27.3178(598.18)(4).

A parent who has been ordered to pay restitution may petition the court for a modification of the amount of restitution owed by that parent or for a cancellation of any unpaid portion of that parent's obligation. The court must "cancel all or part of the parent's obligation due if the court determines that payment of the amount due will impose a manifest hardship on the parent and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim." MCL 780.766(17); MSA 28.1287(766)(17), and MCL 780.794(17); MSA 28.1287(794)(17).*

*The requirement that a court take into account the hardship on the victim when modifying the method of payment is effective June 1, 2001.

10.13 Use of Bail Money to Pay Restitution

If the defendant has personally paid his or her bond or bail, when the bond or bail is discharged, the court shall order that the money be used to pay restitution, costs, fines, probation supervision fees, and other assessments or court-ordered payments. MCL 765.15(2); MSA 28.902(2).* See also MCL 765.6c; MSA 28.886(3), which states that when a defendant personally pays his or her own bond, he or she must be notified that the money may be used pursuant to MCL 765.15(2); MSA 28.902(2), to pay fines, costs, restitution, or other payments ordered by the court.

*This money must be allocated as required by MCL 775.22; MSA 28.1259. See Section 10.22(A), below.

10.14 Use of Proceeds From Property Forfeiture to Pay Restitution

Proceeds from the sale of property forfeited under MCL 600.4701 et seq.; MSA 27A.4701 et seq., may be distributed to victims or used to fund crime victim rights services. Under MCL 600.4708(1); MSA 27A.4708(1), the government agency that seized the property may sell it and use the proceeds for several purposes, including payment of outstanding restitution and other claims by victims. It should be noted, however, that the proceeds must first be used to pay secured creditors before satisfying any claims by victims. MCL 600.4708(1)(a)–(c); MSA 27A.4708(1)(a)–(c). Seventy-five percent of any balance remaining after secured creditors' and victims' claims are paid must be allocated to enhance enforcement of criminal laws, and 25% must be used to implement the Crime Victim's Rights Act. MCL 600.4708(1)(f); MSA 27A.4708(1)(f).

10.15 Orders for Services by Defendant or Juvenile in Lieu of Money

If the victim or the victim's estate consents, the order of restitution may require that the defendant or juvenile make restitution in services in lieu of money. MCL 780.766(6); MSA 28.1287(766)(6), MCL 780.794(6); MSA 28.1287(794)(6), and MCL 780.826(6); MSA 28.1287(826)(6).

10.16 Restitution Ordered As a Condition of Probation or Parole

If the defendant or juvenile is placed on probation, or if the court imposes a conditional sentence under MCL 769.3; MSA 28.1075, any restitution ordered by the court must be a condition of that probation or conditional sentence. MCL 780.766(11); MSA 28.1287(766)(11), MCL 780.794(11); MSA 28.1287(794)(11), and MCL 780.826(11); MSA 28.1287(826)(11).

Court-ordered restitution must also be a condition of parole imposed by the Department of Corrections. MCL 780.766(11); MSA 28.1287(766)(11). However, the sentencing court may not condition a grant of parole on the defendant's or juvenile's full payment of restitution, as the Department of Corrections has exclusive jurisdiction over paroles. *People v Greenberg*, 176 Mich App 296, 310–11 (1989).

A. Restitution and Community Service or Employment Ordered As a Condition of Juvenile Probation

In juvenile delinquency proceedings where restitution is imposed as a condition of probation, the court must also order either community service or employment as a condition of probation. MCL 712A.18(8)(a)–(b); MSA 27.3178(598.18)(8)(a)–(b), state as follows:

“If the court imposes restitution as a condition of probation, the court shall require the juvenile to do either of the following as an additional condition of probation:

- (a) Engage in community service or, with the victim's consent, perform services for the victim.
- (b) Seek and maintain paid employment and pay restitution to the victim from the earnings of that employment.”

B. Wage Assignment by Employed Defendant or Juvenile as a Condition of Probation

*These provisions are effective June 1, 2001.

As a condition of probation, the court may order any employed defendant or juvenile to execute a wage assignment to pay the restitution ordered by the court. MCL 780.766(18); MSA 28.1287(766)(18), MCL 780.794(18); MSA 28.1287(794)(18), and MCL 780.826(15); MSA 28.1287(826)(15).^{*} See also MCL 771.3(2)(f); MSA 28.1133(2)(f), which authorizes wage assignments in criminal cases when probation is ordered.

C. Review of Restitution As a Condition of Probation or Parole

1. Review of Restitution as a Condition of Probation

*The requirement that the probation officer or caseworker review restitution payment at the end of a specified period is effective June 1, 2001.

MCL 780.766(18); MSA 28.1287(766)(18), MCL 780.794(18); MSA 28.1287(794)(18), and MCL 780.826(15); MSA 28.1287(826)(15), provide that in each case in which payment of restitution is ordered as a condition of probation, the probation officer or caseworker assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. If the restitution was ordered to be paid within a specified period of time, the probation officer or caseworker must review the case at the end of the specified period of time to determine whether the restitution has been paid.^{*} A final review of restitution payment must be conducted not less than 60 days before the expiration of the probationary period. *Id.*

*See SCAO Form MC 258 for the required form to report arrearages. The provision allowing the probation officer or caseworker to petition for a probation violation is effective June 1, 2001.

If the probation officer or caseworker determines at any of these required reviews that restitution is not being paid as ordered, he or she must file a written report of the violation with the court on a form prescribed by the State Court Administrative Office or petition the court for a probation violation. *Id.*^{*} The report or petition must include a statement of the amount of the arrearage and any reasons for the arrearage that are known by the probation officer or caseworker. The probation officer or caseworker must immediately provide a copy of the report or petition alleging a probation violation to the prosecuting attorney. If a petition or motion for probation violation is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance. *Id.*

*See Sections 10.17 (revocation of probation), 10.19 (modifying the method of payment), and 10.20 (enforcing restitution orders).

If the court determines that restitution is not being paid or has not been paid as ordered, the court may revoke probation or modify the method of payment. In addition, the prosecuting attorney or a person named in the restitution order may begin proceedings to enforce the restitution order.^{*}

2. Review of Restitution as a Condition of Parole

MCL 791.236(12); MSA 28.2306(12), provides that in each case in which payment of restitution is ordered as a condition of parole, the parole officer assigned to the case must review the case not less than twice yearly to ensure

that restitution is being paid as ordered. A final review of restitution payment must be conducted not less than 60 days before the expiration of the parole period. *Id.* If the parole officer determines at any of these required reviews that restitution is not being paid as ordered, he or she must file a written report of the violation with the parole board on a form prescribed by the parole board. *Id.* The report must include a statement of the amount of the arrearage and any reasons for the arrearage that are known by the parole officer. The parole officer must immediately provide a copy of the report to the court, prosecuting attorney, and victim. *Id.*

If the court determines that restitution is not being paid or has not been paid as ordered, the parole board may revoke parole. In addition, the prosecuting attorney or a person named in the restitution order may begin proceedings to enforce the restitution order.*

*See Sections 10.17 (revocation of parole) and 10.20 (enforcing restitution orders).

10.17 Revocation of Probation or Parole or Imposition of Conditional Sentence for Failure to Comply With Restitution Order

In criminal cases, the court may revoke probation or impose imprisonment under a conditional sentence if the defendant fails to comply with the restitution order and has not made a good-faith effort to comply with the order. MCL 780.766(11); MSA 28.1287(766)(11), and MCL 780.826(11); MSA 28.1287(826)(11).* Similarly, the parole board may revoke parole if the defendant has failed to comply with the restitution order and has not made a good-faith effort to do so. MCL 780.766(11); MSA 28.1287(766)(11). These statutes set forth the criteria to use in deciding whether to revoke probation, impose imprisonment under a conditional sentence, or revoke parole. The court or parole board must consider “the defendant’s employment status, earning ability, and financial resources, the willfulness of the defendant’s failure to pay, and any other special circumstances that may have a bearing on the defendant’s ability to pay.” MCL 780.766(11); MSA 28.1287(766)(11), and MCL 780.826(11); MSA 28.1287(826)(11).

*See, however, MCR 6.931(F)(10), which prohibits the court in “automatic waiver” cases from revoking probation and committing the juvenile to the Department of Corrections for failing to pay restitution.

MCL 780.794(11); MSA 28.1287(794)(11), contains similar provisions that apply to revocation of probation in juvenile delinquency cases.

MCL 780.766(14); MSA 28.1287(766)(14), states that “a [felony] defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good-faith effort to do so.” MCL 780.794(14); MSA 28.1287(794)(14), MCL 780.766(11); MSA 28.1287(766)(11), and MCL 780.826(14); MSA 28.1287(826)(14), contain substantially similar requirements for cases involving juveniles and misdemeanants.*

*MCL 712A.18(9); MSA 27.3178 (598.18)(9), authorizes the court to revoke probation if the juvenile intentionally refuses to perform required community service.

The required findings in the foregoing statutes are necessary to avoid an equal protection violation when a defendant or juvenile is incarcerated for failing to pay restitution. A sentence that exposes an offender to incarceration unless he or she pays restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on ability to pay the restitution. *Tate v Short*, 401 US 395, 397–400; 91 S Ct 668; 28 L Ed 2d 130 (1971), and *People v Baker*, 120 Mich App 89, 99 (1982). In *People v Collins*, 239 Mich App 125 (1999), the trial court sentenced defendant to 48 months of probation, including a year in jail. The sentence provided that 270 days of the jail time would be suspended if defendant paid \$31,505.50 in restitution. Defendant sought a hearing on his ability to pay the restitution, but the trial court denied defendant’s request. The trial court reasoned that defendant was not being jailed for failing to pay restitution; instead, he was being denied a suspension of the sentence for failing to meet a condition of the suspension. The Court of Appeals rejected the trial court’s distinction. *Id.* at 133. Defendant could not be required to serve the suspended portion of the sentence without findings by the trial court that defendant had the ability to pay the restitution and had wilfully defaulted. *Id.* at 136. The Court of Appeals remanded the case to the trial court for findings on these issues.

10.18 Payment of Restitution When Defendant Is Remanded to Department of Corrections

MCL 780.766(19); MSA 28.1287(766)(19), states that if “a defendant who is ordered to pay restitution under this section is remanded to the jurisdiction of the department of corrections, the court shall provide a copy of the order of restitution to the department of corrections when the defendant is remanded to the department’s jurisdiction.” MCL 780.794(19); MSA 28.1287(794)(19), and MCL 780.826(16); MSA 28.1287(826)(16), contain substantially similar provisions that require the court to transmit the order of restitution when the court determines that the individual subject to the order has been remanded to the Department of Corrections.

If a prisoner has been ordered to pay restitution to a crime victim and the court has sent the Department of Corrections a copy of the order of restitution, the Department of Corrections “shall deduct 50% of the funds received by the prisoner in a month over \$50.00 for payment of restitution.” MCL 791.220h(1); MSA 28.2290(8)(1). The Department of Corrections must promptly forward to the victim restitution received when the amount received exceeds \$100.00, or the entire amount received when the prisoner is paroled, transferred to a community program, or discharged on the maximum sentence. *Id.* The Department of Corrections must not alter these requirements through an agreement with the prisoner. MCL 791.220h(3); MSA 28.2290(8)(3).

Note: Prisoners may object to the deduction of money from their accounts under MCL 791.220h(1); MSA 28.2290(8)(1), on grounds that the money was not given to them but sent to them by

family members for a prisoner's use. However, the statute requires the Department of Corrections to deduct "funds received by the prisoner" and does not require the prisoner to "own" the money.

In *White-Bey v Dep't of Corrections*, 239 Mich App 221 (1999), the trial court recommended that the plaintiff-prisoner pay the victim \$140.00 in restitution as a condition of parole or discharge. While plaintiff-prisoner was still in prison, the defendant-Department of Corrections began to remove funds from plaintiff-prisoner's account to satisfy the restitution order, and plaintiff-prisoner sought an injunctive order. The Court of Appeals upheld the removal of plaintiff-prisoner's funds to pay the restitution. The Court of Appeals relied in part on the CVRA although the plaintiff-prisoner's offense was committed before the CVRA was enacted. Under the version of MCL 780.766; MSA 28.1287(766), in effect on the date of plaintiff-prisoner's sentencing, restitution was payable immediately unless the sentencing court ordered it payable within a specified period or in installments.* Because there was no language in the judgment of sentence providing for payment within a specified period or in installments, restitution was payable immediately. Moreover, the sentencing court did not have authority to order a condition of parole because the Department of Corrections has exclusive jurisdiction over paroles. Thus, the portion of the judgment of sentence that conditioned parole or discharge upon payment of restitution could not be relied upon to prevent the Department of Corrections from removing funds from the plaintiff-prisoner's account.

*This provision of the CVRA is still in effect. See Section 10.6, above.

1. Use of Funds From Prisoner Lawsuits to Pay Restitution

Funds owed by the Department of Corrections to a prisoner for civil judgments or settlements may also be used to satisfy a restitution order. MCL 791.220h(2); MSA 28.2290(8)(2), states in part:

"Any funds owed by the Michigan department of corrections or to be paid on behalf of one or more of its employees to satisfy a judgment or settlement to a person for a claim that arose while the person was incarcerated, shall be paid to satisfy any order(s) of restitution imposed on the claimant that the department has a record of. The payment shall be made as described in [MCL 791.220h(1); MSA 28.2290(8)(1)]. The obligation to pay the funds, described in this section, shall not be compromised. As used in this section, 'fund' or 'funds' means that portion of a settlement or judgment that remains to be paid a claimant after statutory and contractual court costs, attorney fees, and expenses of litigation, subject to the court's approval, have been deducted."

See also MCL 600.5511(2)–(3); MSA 27A.5511(2)–(3), which provide that damages awarded to a prisoner in a suit brought against a prison or an official, employee, or agent of a prison must be used to satisfy restitution orders, and

that the court awarding such damages must make reasonable efforts to notify any victim of the prisoner's offense of the prisoner's pending receipt of damages.

2. Use of Inmate Wages to Pay Restitution

Eligible inmates of a correctional institution may be assigned to work in a private manufacturing or service business. MCL 800.327a; MSA 28.1540(7a). Wages paid to the inmate are distributed according to statute. Under MCL 800.327a(3); MSA 28.1540(7a)(3), 20% of the inmate's after-tax wages must go to satisfy a restitution order. If restitution has been paid in full or was not ordered, 10% of the inmate's wages is paid into an escrow account for the inmate's benefit, and 10% is paid into the Crime Victim's Rights Fund.

10.19 Modification of Method of Payment of Restitution

Pursuant to the CVRA, a court may modify the method of payment of restitution imposed on a defendant or juvenile. MCL 780.766(12); MSA 28.1287(766)(12), states as follows:

*The requirement that a court consider the effect of the modification on the victim is effective June 1, 2001.

“A defendant who is required to pay restitution and who is not in willful default of the payment of the restitution may at any time petition the sentencing judge or his or her successor to modify the method of payment. If the court determines that payment under the order will impose a manifest hardship on the defendant or his or her immediate family, and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim,* the court may modify the method of payment.”

MCL 780.794(12); MSA 28.1287(794)(12), and MCL 780.826(12); MSA 28.1287(826)(12), contain substantially similar requirements.

In criminal cases, the court has authority to alter and amend conditions of probation. MCL 771.2(2); MSA 28.1132(2). Indeed, upon petition by the probationer, the court should conduct a hearing to determine whether the probation order should be modified. *People v Ford*, 95 Mich App 608, 612 (1980), rev'd on other grounds 410 Mich 902 (revocation of probation was proper for failure to pay child support and costs where the defendant failed to petition the court for modification of his probation conditions), and *People v Lemon*, 80 Mich App 737, 743 (1978) (sentencing court abused its discretion by refusing to modify the restitution condition of the probation order where the defendant petitioned for modification of the order).

The CVRA gives the court authority to modify *or cancel* the amount of restitution owed by a juvenile's parent. MCL 780.794(17); MSA 28.1287(794)(17), and MCL 780.766(17); MSA 28.1287(766)(17). The CVRA does not contain a provision authorizing a court to modify or cancel the amount owed by a defendant or juvenile. See MCL 780.766(13); MSA 28.1287(766)(13), MCL 780.794(13); MSA 28.1287(794)(13), and MCL 780.826(13); MSA 28.1287(826)(13) (restitution orders remain in effect until they are satisfied in full).*

*See Section 10.12, above (orders of restitution directed to parents of juveniles) and 10.20, below (enforcement of restitution orders).

10.20 Enforcement of Restitution Orders

An order of restitution remains in effect until it is satisfied in full. MCL 780.766(13); MSA 28.1287(766)(13), and MCL 780.826(13); MSA 28.1287(826)(13), state:

“An order of restitution entered under this section remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien.”

MCL 780.794(13); MSA 28.1287(794)(13), contains a substantially similar provision that applies to cases under the juvenile article of the CVRA. Because an order of restitution may be enforced against a juvenile's parent, MCL 780.794(13); MSA 28.1287(794)(13), provides that the restitution order is a lien against “all property of the individual ordered to pay restitution.”

A restitution order may be payable immediately, within a specified period, or in installments. MCL 780.766(10); MSA 28.1287(766)(10), MCL 780.794(10); MSA 28.1287(794)(10), and MCL 780.826(10); MSA 28.1287(826)(10). There are no statutory time limits on payment of restitution. See 1996 PA 562 (eliminating requirements that restitution payments coincide with probation or parole periods) and *United States v Rostoff*, 956 F Supp 38, 43–44 (D Mass, 1997) (restitution orders under the federal Victim and Witness Protection Act are not time limited).

A. Proceedings to Enforce a Restitution Order

A person entitled to restitution cannot seek to enforce a restitution order in the same manner as a civil judgment until the person ordered to pay restitution fails to comply with the order. When the defendant or juvenile fails to comply with the order, proceedings to enforce the restitution order, which is a judgment against the person(s) ordered to pay, may be instituted. In such cases, the restitution order is enforced in the same manner as a civil judgment,

not by filing a new civil action. *Indesco Products, Inc v Novak*, 735 NE 2d 1082, 1085–86 (Ill App Ct, 2000).

Note: A detailed discussion of the enforcement of civil judgments is beyond the scope of this manual. See MCR 2.621 and the statutes cited therein.

*The Michigan Supreme Court has referred to the VWPA when interpreting Michigan's restitution provisions. See, e.g., *People v Law*, 459 Mich 419, 425 (1999), and *People v Grant*, 455 Mich 221, 230 (1997).

*These provisions are effective June 1, 2001.

In *Lyndonville Savings Bank & Trust Co v Lussier*, 211 F3d 697 (CA 2, 2000), a federal appellate court construed language in the federal Victim and Witness Protection Act similar to that in Michigan's CVRA that allowed for enforcement of a restitution order "in the same manner as a judgment in a civil action."* The Court held that the beneficiary of a restitution order cannot immediately seek a separate civil judgment to modify the payment terms of the restitution order, nor must the beneficiary of a restitution order seek a separate civil judgment before enforcing the restitution order. *Id.* at 702–04. The Court stated that the "statutory right to enforcement is part of the criminal sentencing process and may not be read to create a separate and independent civil cause of action . . ." *Id.* at 699.

In all cases under the CVRA, the court must not impose a fee on a victim, victim's estate, or prosecuting attorney for enforcing a restitution order. MCL 780.766(20); MSA 28.1287(766)(20), MCL 780.794(20); MSA 28.1287(794)(20), and MCL 780.826(17); MSA 28.1287(826)(17).*

B. Restitution Order Is Not Dischargeable in a Bankruptcy Proceeding

The United States Supreme Court has held that a restitution order is not dischargeable in bankruptcy proceedings. *Kelly v Robinson*, 479 US 36, 50; 107 S Ct 353; 93 L Ed 2d 216 (1986). Under 11 USC 523(a)(7), any debt "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and [which] is not compensation for actual pecuniary loss . . ." is not dischargeable. The Court in *Kelly* noted that state criminal judgments—including restitution orders—have historically not been dischargeable in bankruptcy proceedings. *Kelly, supra*, at 44–48. The Court also noted that allowing discharge of restitution orders would compel state prosecuting attorneys to defend such orders in federal court. *Id.* at 48–49. The Court then stated its holding broadly: ". . . we hold that §523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence."

As stated above, 11 USC 523(a)(7), excepts from discharge any debt “for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and [which] is not compensation for actual pecuniary loss” Although Michigan’s restitution provisions require the sentencing court to order restitution for pecuniary losses suffered by victims,* the United States Supreme Court in *Kelly, supra*, at 51–52, stated that for purposes of bankruptcy proceedings there is no meaningful distinction between criminal fines and restitution:

“On its face, [11 USC 523(a)(7)] creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both ‘to and for the benefit of a governmental unit,’ and ‘not compensation for actual pecuniary loss.’ Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines. We must decide whether the result is altered by the two major differences between restitution and a traditional fine. Unlike traditional fines, restitution is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused.

In our view, neither of the qualifying clauses of §523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment ‘for the benefit of’ the victim, the context in which it is imposed undermines that conclusion.”

C. No Remission of Restitution When Conviction or Adjudication Is Set Aside

If a juvenile or defendant successfully moves to set aside his or her adjudication or conviction, the juvenile or defendant “is not entitled to the remission of any fine, costs, or other sums of money paid as a consequence of an adjudication [or conviction] that is set aside,” including restitution. MCL 712A.18e(11)(a); MSA 27.3178(598.18e)(11)(a), and MCL 780.622(2); MSA 28.1274(102)(2).

*See Section 10.7, above, (determining the amount of restitution to order under Michigan law). The Michigan Supreme Court has stated that restitution under Michigan’s CVRA is compensatory in nature, not punitive. See Section 10.1(A), above.

10.21 Required Set Offs for Damages or Compensation Received by Victims

*For information on coordinating the payment of restitution and crime victim compensation by the Crime Victim Services Commission, See Section 10.24, below.

If the victim recovers compensatory damages in a civil suit resulting from the offense, the amount of compensatory damages must be reduced by the amount of restitution received by the victim. In addition, an award of compensation from the Crime Victim Services Commission must be reduced by the amount of restitution received by the victim.* MCL 780.766(9); MSA 28.1287(766)(9), MCL 780.794(9); MSA 28.1287(794)(9), and MCL 780.826(9); MSA 28.1287(826)(9), state as follows:

“Any amount paid to a victim or victim’s estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim’s estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim’s estate by an award from the crime victim services commission made after an order of restitution under this section.”

10.22 Allocation of Fines, Costs, Restitution, Fees, Assessments, and Other Payments

In addition to restitution, the defendant or juvenile may be ordered to pay court costs, penal fines, probation or parole supervision fees, and other payments or assessments. Typically, the defendant or juvenile makes incremental payments to the trial court rather than paying all of the restitution, costs, fines, fees, and assessments at once. When the trial court receives a payment from the defendant or juvenile, the court must allocate the money pursuant to statute. The allocation of all monies received from the defendant or juvenile is discussed below.

Note: MCL 600.1475; MSA 27A.1475, requires a court to pay back with interest amounts collected if the judgment under which collection is made is later reversed. The Court of Appeals has held that a trial court acts “as a conduit in channeling [a] defendant’s restitution payments to the victim” and therefore has no statutory duty to refund such payments to a defendant if the order of restitution is reversed. *People v Diermier*, 209 Mich App 449, 451 (1995). A defendant, juvenile, or juvenile’s parent could seek restitution from a victim of the amount paid if the judgment were later reversed, however. See *Moore v Baugh*, 106 Mich App 815, 819 (1981) (when a judgment is reversed, the party who received any benefit under the judgment must restore that benefit to the other party).

MCL 780.905(5); MSA 28.1287(905)(5), states that “[i]f a person is subject to any combination of fines, costs, restitution, assessments, or payments arising out of the same criminal or juvenile proceeding,” the money collected from that person must be distributed as required by MCL 775.22; MSA 28.1259 (criminal cases), and MCL 712A.29; MSA 27.3178(598.29) (juvenile delinquency cases). See also MCL 712A.29(1); MSA 27.3178(598.29)(1) (money collected from a juvenile’s parents must be distributed according to MCL 712A.29; MSA 27.3178(598.29)). A recent amendment to the CVRA added provisions to all three articles of the CVRA* for allocating payments that mirror those contained in MCL 775.22; MSA 28.1259. See MCL 780.766a; MSA 28.1287(766a), MCL 780.794a; MSA 28.1287(794a), and MCL 780.826a; MSA 28.1287(826a).

*These provisions are effective June 1, 2001.

The provisions that apply in criminal cases are discussed in Section 10.22(A), below. In juvenile delinquency cases, fines, costs, restitution, assessments, and other payments collected from a juvenile or his or her parent must be allocated pursuant to MCL 712A.29; MSA 27.3178(598.29). This provision is discussed in Section 10.22(B), below.

A. In Criminal Cases

Under MCL 775.22; MSA 28.1259, MCL 780.766a; MSA 28.1287(766a), MCL 780.794a; MSA 28.1287(794a), and MCL 780.826a; MSA 28.1287(826a), each payment by the defendant or juvenile for victim payments, fines, costs, assessments, probation or parole supervision fees, or other payments must be allocated as follows:

- F Fifty percent must be applied to victim payments. MCL 775.22(2); MSA 28.1259(2), MCL 780.766a(2); MSA 28.1287(766a)(2), MCL 780.794a(2); MSA 28.1287(794a)(2), and MCL 780.826a(2); MSA 28.1287(826a)(2). “Victim payments” mean restitution ordered to be paid to the victim or victim’s estate but not to an individual or entity that has reimbursed a victim for losses arising from the offense, and assessments paid to the Crime Victim’s Rights Fund. MCL 775.22(5); MSA 28.1259(5), MCL 780.766a(5); MSA 28.1287(766a)(5), MCL 780.794a(5); MSA 28.1287(794a)(5), and MCL 780.826a(5); MSA 28.1287(826a)(5).*
- F For violations of state law, the remaining money must be applied in the following descending order of priority:
 - costs;
 - fines;
 - probation or parole supervision fees;
 - assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 775.22(3); MSA 28.1259(3), MCL 780.766a(3); MSA 28.1287(766a)(3), MCL 780.794a(3); MSA

*See Section 10.5 (persons or entities entitled to restitution) and 2.8(A)–(C) (Crime Victim’s Rights Fund assessment).

28.1287(794a)(3), and MCL 780.826a(3); MSA 28.1287(826a)(3). “Other payments” include payments to individuals or entities that have reimbursed a victim for losses arising from the offense. MCL 780.766a(3)(d); MSA 28.1287(766a)(3)(d), MCL 780.794a(3)(d); MSA 28.1287(794a)(3)(d), and MCL 780.826a(3)(d); MSA 28.1287(826a)(3)(d).

F For violations of local ordinances, the remaining money collected must be applied in the following descending order of priority:

- payment of fines and costs;
- payment of assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 775.22(4); MSA 28.1259(4), MCL 780.766a(4); MSA 28.1287(766a)(4), MCL 780.794a(4); MSA 28.1287(794a)(4), and MCL 780.826a(4); MSA 28.1287(826a)(4).

If any victim payments remain unpaid after all of the other fees have been paid, then all of the remaining money collected shall be applied to victim payments. Conversely, if all of the victim payments have been made, then all of the remaining money collected shall be applied to the other fees in the order of priority listed above. MCL 775.22(2); MSA 28.1259(2), MCL 780.766a(2); MSA 28.1287(766a)(2), MCL 780.794a(2); MSA 28.1287(794a)(2), and MCL 780.826a(2); MSA 28.1287(826a)(2).

B. In Juvenile Delinquency Cases

Under MCL 712A.29; MSA 27.3178(598.29), each payment made by a juvenile or his or her parents for victim payments, fines, costs, assessments, or other assessments or payments must be allocated as follows:

F Fifty percent of the money must be applied to victim payments. MCL 712A.29(2); MSA 27.3178(598.29)(2). “Victim payments” mean restitution ordered to be paid to the victim or victim’s estate but not to an individual or entity that has reimbursed a victim for losses arising from the offense, and assessments paid to the Crime Victim’s Rights Fund. MCL 712A.29(7); MSA 27.3178(598.29)(7).*

F In cases involving orders of disposition for offenses that would be violations of state law if committed by an adult, the remaining money must be applied in the following descending order of priority:

- payment of costs;
- payment of fines;
- payment of assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 712A.29(3); MSA 27.3178(598.29)(3).

*See Section 10.5 (persons or entities entitled to restitution) and 2.8(A)–(C) (Crime Victim’s Rights Fund assessment).

F In cases involving orders of disposition for offenses that would be violations of local ordinances if committed by an adult, the remaining money must be applied in the following descending order of priority:

- payment of fines and costs;
- payment of assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 712A.29(4); MSA 27.3178(598.29)(4).

If fines, costs, or other assessments or payments remain unpaid after all victim payments have been paid, additional money collected shall be applied to payment of those fines, costs, or other assessments or payments. If victim payments remain unpaid after all fines, costs, or other assessments or payments have been paid, additional money collected shall be applied toward payment of those victim payments. MCL 712A.29(2); MSA 27.3178(598.29)(2).

10.23 Unclaimed Restitution

If they are not claimed within two years after being ordered, restitution payments must be deposited in the “crime victim’s rights fund” via the court’s monthly transmittal. However, a person or entity entitled to the restitution payments may claim the money at any time after it has been deposited in the fund. If this occurs, the court must pay the claimed restitution to the claimant, and the Crime Victim Services Commission must credit the court in the amount of the claimed restitution on the court’s next monthly transmittal. MCL 780.766(21); MSA 28.1287(766)(21), MCL 780.794(21); MSA 28.1287(794)(21), and MCL 780.826(18); MSA 28.1287(826)(18).*

*See Section 2.8(D) for a quotation of these statutory provisions, which are effective June 1, 2001.

10.24 Coordinating Restitution and Crime Victim Compensation Awards

The court must not order restitution to be paid to the direct victim of a crime or an offense “if the victim or victim’s estate has received or is to receive compensation” for a loss from another source, such as an insurance company or the Crime Victim Services Commission (“CVSC”).* In such cases, the court must order restitution to be paid to the insurance company or CVSC in the amount of the compensation paid by the insurance company or CVSC. MCL 780.766(8); MSA 28.1287(766)(8), MCL 780.794(8); MSA 28.1287(794)(8), and MCL 780.826(8); MSA 28.1287(826)(8). If the court orders restitution to the direct victim of an offense for losses for which the direct victim later receives an award from the CVSC, the award of crime victim compensation must be reduced by the amount of restitution received by the direct victim. MCL 780.766(9); MSA 28.1287(766)(9), MCL 780.794(9); MSA 28.1287(794)(9), MCL 780.826(9); MSA 28.1287(826)(9), and MCL 18.361(5)(a); MSA 3.372(11)(5)(a).

*See Chapter 11 for a detailed discussion of crime victim compensation awards from the Crime Victim Services Commission.

The following materials are provided by the Crime Victim Services Commission to help the court and prosecuting attorney coordinate the payment of restitution and crime victim compensation awards.